No. 18644

IN THE

United States Court of Appeals

For the Ninth Circuit

PORT OF PASCO,
a municipal corporation,
Appellant,

vs.

PACIFIC INLAND NAVIGATION CO., INC.,
Appellee.

No. 18644

On Appeal from the District Court of the United States, for the Eastern District of Washington, Northern Division

BRIEF OF APPELLANT

JEROME WILLIAMS
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Proctors for Appellant
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BRIEF OF APPELLANT

STATEMENT AS TO JURISDICTION

This action concerns an explosion of a cargo of gasoline on appellee's Barge 535, Port of Longview, which occurred on December 16, 1958, while the barge was moored at one of appellant's docks on the Columbia River at Pasco, Washington.

The action was brought by appellee, Pacific Inland Navigation Company, seeking to avail itself of the provisions of Title 46 U. S. Code §181, et seq., "An Act to Limit the Liability of Ship Owners and for

Other Purposes," and also seeking to enjoin the further prosecution of an action which appellant had previously commenced in the Washington State Superior Court for Franklin County to recover for the damage to its dock (Tr. 1-15). The specific statutory authority for this type of action rests in Title 46 U. S. Code §183-185.

Following the commencement of this action, an agreed order was entered by the District Court by the terms of which the State Court action was to proceed to trial for determination of the issues of liability and damages and, if the State Court found liability, the parties were to return to the District Court which was then to pass upon the question of limitation of liability (Tr. 37-39).

Thereafter, the State Court found that appellee was liable and assessed appellant's damages at $55,464 (Tr. 47-53). This case was then tried by District Judge Charles L. Powell, and, after an oral ruling favorable to appellee, Findings of Fact, Conclusions of Law and Judgment limiting liability were entered on December 27, 1962 (Tr. 113-134).

Appellant filed Notice of Appeal on January 25, 1963, or well within the time permitted by Title 28 U. S. Code §2107 (Tr. 137). An appeal bond was filed by appellant at the same time (Tr. 135). Accordingly, this Court has jurisdiction of this appeal pursuant to Title 28 U. S. Code §1291 and §2107 and FRCP Rule 73.

Appellant's Designation of Contents of Record on

Appeal, pursuant to FRCP Rule 75, was filed with the district court clerk on January 28, 1963, appellant therein designating that the entire record should be included (Tr. 138). The time of docketing the record with this court was extended to April 22, 1963, by order of the District Judge entered February 15, 1963, and the record was docketed with this court on April 19, 1963 (Tr. 349).

STATEMENT OF THE CASE

A single question[1] is presented by this appeal: Under 46 U. S. Code §183 (a), which provides for the limitation of the liability of a vessel owner where the casualty occurred "without the privity or knowledge of such owner", was there any substantial basis for the ruling of the District Judge limiting liability, particularly in view of the admitted facts contained in the pre-trial order?

On December 16, 1958, one of appellee's barges, known as Barge 535, Port of Longview, exploded, burned and sank while moored alongside a dock owned by appellant, Port of Pasco. Appellant's dock sustained damage as a result of this casualty in the amount of $55,464.00 (Tr. 67).

Barge 535 had arrived at appellant's dock in Pasco from Linnton, Oregon, on December 15, 1958, carrying a cargo of 328,056 gallons of gasoline (Tr. 63, 67). Preparatory to the actual unloading of the cargo into

[1]Appellant has abandoned the jurisdictional question raised by Point 1 of Appellant's Statement of Points, filed pursuant to Rule 17 of this Court.

appellee's adjacent tank farm, two of appellee's subordinate employees at Pasco, Gale Oldfield and Wilbur Bunce, boarded the barge at about 9:00 p.m. to adjust the throttle linkage on a diesel motor which powered the pump on the barge (Tr. 174).

While Oldfield and Bunce were on the barge, they found that the circuit breaker switch controlling the starboard deck lights tripped off after the starboard lights had been turned on momentarily (Tr. 177, 188). It was a conceded fact that "Oldfield and Bunce did not possess sufficient skill or understanding of things electrical so as to realize that the circuit breaker switch, by so tripping, was giving notice or warning of a defective or shorted condition" in the starboard deck light circuit (Tr. 68). Mr. Oldfield, believing that the trouble was in the circuit breaker switch, replaced this unit, following which the lights appeared to function normally (Tr. 67-69). In fact, however, the circuit breaker had tripped because of a short circuit of an intermittent nature in the starboard deck light circuit itself (Tr. 67-69).

Thereafter, the unloading of the cargo of gasoline was commenced and proceeded for about four hours with the starboard deck lights on, until shortly after midnight on December 16, when a violent explosion occurred (Tr. 68, 205, 150). The explosion was set off by an electric arc produced by the same short in the starboard deck light circuit which had previously manifested itself to Oldfield and Bunce by the tripping of the circuit breaker, this electric arc having

ignited the gasoline vapors incident to the unloading operation (Tr. 67-68). The use of the deck lights, port and starboard, was a mere convenience, and in no wise necessary during the critical operation of loading or unloading of these barges, according to E. R. Boyles, appellee's supervisor of petroleum operations (Tr. 247).

Appellant, Port of Pasco, commenced an action against appellee in the Superior Court of the State of Washington, County of Franklin, seeking to recover for the damages to its dock. On January 26, 1962, at which time the aforesaid State Court action was about to be tried, appellee commenced this action by filing a "Petition for Exoneration from or Limitation of Liability" (Tr. 1-7).

Upon the filing of the initial petition in this action, appellee obtained an order restraining the further prosecution of the pending State Court action (Tr. 24-26). Thereafter, on February 15, 1962, based upon the stipulation of certain matters by appellant through its attorneys, and this being a single claim proceedings, the District Judge entered an agreed order modifying the aforesaid restraining order so as to permit the State Court action to proceed to trial "on the issues of the liability of the defendant (appellee), if any, and as to the amount of plaintiff's (appellant's) damages * * *", but reserving to the District Court, jurisdiction "to determine and adjudicate the claim of petitioner herein and defendant in Cause No. 10527 of the State Court as to its right to

limitation of liability under the provisions of Title 46 U. S. Code §183, et seq., as amended" (Tr. 37-39). The aforesaid agreed order further provided "that upon final disposition of the issues as to liability and damages in cause 10527 by the State Court or upon disposition of any appeal from such State Court judgment, the issue as to petitioner's claim of limitation of liability shall be adjudicated by this court and the parties shall return to this court for that purpose" (Tr. 38-39).

The State Court action then proceeded to trial on April 3, 1962, before Judge James J. Lawless sitting without a jury, and ultimately resulted in findings of fact, conclusions of law and judgment awarding appellant, Port of Pasco, damages of $55,464 against appellee (Tr. 47-53).

The State Court findings upon which its judgment in appellant's favor was based are of critical importance to this appeal. Certain of the findings were, by the terms of the pre-trial order herein, conceded to be binding upon appellee on the issues of liability and damages (Tr. 67). These concededly binding findings of the State Court, because of their importance to this appeal, are now set forth in full:

"III.

"On the 16th day of December, 1958, the aforesaid Barge 535, Port of Longview, which was carrying a cargo of gasoline, was moored at one of plaintiff's docks at Pasco, Washington, and while the said cargo of gasoline was being discharged from the said barge into tanks situated

on the adjacent shore, an explosion occurred at the forward end of the barge, followed by fire which communicated to plaintiff's dock facilities, causing damage to plaintiff's said dock facilities in the amount of $55,464.00.

"IV.

"The said explosion occurred from the ignition of gasoline vapors incident to the unloading operation, which said vapors were ignited by an electric arc produced by a short in the starboard deck light circuit of the said barge. The aforesaid short was a defective condition in the said starboard deck light circuit which had previously manifested itself to defendant's employees Oldfield and Bunce approximately four hours before the explosion by causing the circuit breaker switch which served the said starboard deck lights to kick off or trip, as the said circuit breaker switch was designed to do in the event of a malfunction in the circuit.

"V.

"The said circuit breaker switch is not a simple tool and the aforesaid employees of defendant, Oldfield and Bunce, did not possess sufficient skill or understanding of things electrical so as to realize that the circuit breaker switch, by so tripping, was giving notice or warning of a defective or shorted condition in the said starboard deck light circuit, and said employees proceeded to replace the said circuit breaker switch with a new one, which was followed by the apparently normal operation of the starboard deck lights. The said employees thereupon erroneously concluded that a malfunction in the circuit breaker switch itself had caused the circuit breaker to trip as aforesaid, but the Court finds as a fact that the circuit breaker switch was not in any

way defective but tripped as the result of a shorted condition in the starboard deck light circuit which was of an intermittent nature, and that defendant's said employees in nowise corrected this defective condition by replacing the said circuit breaker switch" (Tr. 67-69).

In addition to these concededly binding facts, the State Court entered its Finding VI, as follows:

"The defendant corporation, acting through its management personnel, had never issued any instructions to its employees at Pasco, Washington, nor otherwise eductated said employees as to proper and safe methods to employ in the event of any malfunction of the electrical systems on any of defendant's gasoline barges. The time of greatest hazard about a gasoline barge occurs when the gasoline is being unloaded and particularly when the tanks of the barge are nearly empty, and any malfunctioning of an electrical system which may produce a spark or arcing presents a situation of extreme peril of explosion. The management personnel of the defendant corporation were fully aware of the aforesaid hazard and of the function of circuit breaker switches as a warning device, but the said employees, Oldfield and Bunce, were not so aware. The defendant corporation, acting through its management personnel, was negligent in failing to issue instructions to its employees or to otherwise educate them as to the warning function of the circuit breaker switches and as to safe and proper practices when such circuit breakers trip, particularly when gasoline is being or is about to be unloaded. The said explosion would not have occurred if the said employees had been so instructed or educated, and the said explosion was proximately caused by the negligence of the defendant in this respect" (Tr. 51-52).

The allegation that appellee, Pacific Inland Naviga-

tion Company, "acting through its management personnel, was negligent in failing to issue instructions to its employees or to otherwise educate them as to the warning function of the circuit breaker switches and as to safe and proper practices when such circuit breakers tripped, particularly when gasoline was being or was about to be unloaded" was the only ground of negligence asserted upon the trial of the State Court action and was fully tried out there, appellee having been permitted to re-open and present additional testimony on that issue (Tr. 47, 49).

No appeal was taken by appellee from the State Court judgment and the parties thereupon returned to the District Court (Tr. 44-46).

After the formulation of a pre-trial order which embraced the foregoing conceded facts, the District Court action proceeded to trial (Tr. 62-88). Appellee offered testimony as to the custom of prudent barge operators under similar circumstances, and appellant offered rebutting testimony. Appellee's witnesses on this subject asserted that there was no custom among prudent operators to issue instructions to employees or to otherwise educate them as to the warning function of the circuit breakers on gasoline barges, whereas appellant's evidence on this subject was directly to the contrary (Tr. 303, 330-332).

Appellee also produced as a witness one Holt, an electrician from the city of Seattle, who testified to considerable experience with shipboard electrical installations. On direct examination Mr. Holt testified

that if the replacement of a tripped circuit breaker re-established the lights as was the case here, he would be "fairly positive" that it was the breaker that was at fault and not the line (Tr. 271). On cross-examination he conceded that even so, the tripping of the circuit breaker could have been caused by an intermittent short in the circuit (Tr. 283).

The evidence disclosed that the hazard of explosion was considerably greater when loading or unloading one of these gasoline barges, than when moored or under way in a loaded condition (Tr. 234, 246). *However, it was conclusively shown by appellee's own employees, including its supervisor of petroleum operations, E. R. Boyles, that appellee's management personnel had never issued any instructions to its employees or otherwise educated its employees as to what to do in the event of any apparent malfunction of the electrical systems or tripping of a circuit breaker on this barge or other barges in the company's system when loading or unloading was in progress or about to begin* (Tr. 185-186, 188-189, 210-212, 245-249). The use of the deck lights was not necessary, and appellee's own expert, Mr. Holt, testified that the safe procedure would have been to leave the lights off after the tripping of the circuit breaker (Tr. 246-249, 284-285).

At the conclusion of the trial in the court below, the District Judge, in a short oral opinion, announced that he was going to limit liability on the ground that there was a lack of privity or knowledge of the owners of the vessel, and said: "I am not passing on

negligence" (Tr. 344). It having been previously stipulated that the barge itself was without value following the explosion and ensuing fire, and that the freight bill associated with the cargo then being carried was in the amount of $3,458.31, the District Judge entered a decree limiting liability to that amount and preventing the collection of the State Court judgment to the extent that it exceeded that amount (Tr. 132-134). *Appellee's petition for exoneration from liability was denied by the District Judge* (Tr. 133). This appeal followed.

SPECIFICATIONS OF ERROR

1. The District Court erred in making and entering its Findings of Fact in their entirety, for the reason that the matters conclusively determined by the Washington State Court, together with the admitted facts contained in the pre-trial order and other facts clearly established upon the trial, as a matter of law required contrary findings denying limitation of liability.

2. The District Court erred in making and entering its Findings of Fact in their entirety, for the reason that the granting of limitation of liability under the evidence here presented is a clearly erroneous result within the meaning of FRCP Rule 52(a).

3. The District Court erred in making and entering its Finding of Fact XXV (Tr. 128) as follows:

   "That Petitioner had exercised due diligence

and had adequately performed any duty or obligation resting upon it as barge owner to instruct and educate its employees concerning the operations of handling and discharging bulk gasoline from its floating equipment, including BARGE 535, or to warn its employees concerning any known or probable hazards relating to the electrical equipment and circuit breakers installed on BARGE 535."

for the reason that the evidence and admitted facts do not support this finding as a matter of law, or at least it is clearly erroneous within the meaning of FRCP Rule 52(a).

4. The District Court erred in making and entering its Finding of Fact XXVIII (Tr. 129) as follows:

"That Petitioner was not in privity with any act or failure to act of the tankermen and maintenancemen employed by it which the Court in Cause No. 10527 may have found to have been the proximate cause of the accident."

for the reason that the evidence and admitted facts do not support this finding as a matter of law, or at least it is clearly erroneous within the meaning of FRCP Rule 52(a).

5. The District Court erred in making and entering its Finding of Fact XXIX (Tr. 129) as follows:

"That Petitioner was not negligent in failing to issue particular instructions or warnings to its maintenancemen and tankermen regarding proper procedures to follow in the event some difficulty or malfunction was encountered in the operation of electrical wiring circuits or circuit

breaker switches aboard BARGE 535 while engaged in transporting, loading or discharging bulk gasoline products."

for the reason that the evidence and admitted facts do not support this finding as a matter of law, or at least it is clearly erroneous within the meaning of FRCP Rule 52(a).

6. The District Court erred in making and entering its Finding of Fact XXX (Tr. 129-130) as follows:

"That under all the circumstances, Petitioner exercised due diligence and reasonable care as to instructing its employees regarding operation, repair and maintenance of the electrical equipment, including circuit breakers, on BARGE 535 before and at the time of the accident on December 16, 1958, and was not negligent with respect thereto."

for the reason that the evidence and admitted facts do not support this finding as a matter of law, or at least it is clearly erroneous within the meaning of FRCP Rule 52(a).

7. The District Court erred in making and entering its Conclusion of Law III (Tr. 131) as follows:

"That Petitioner has sustained the burden of proving that the explosion and fire involving BARGE 535 at the Port of Pasco on December 16, 1958, occurred without the privity or knowledge of Petitioner, its corporate officers, managing agents or supervisory personnel in the managerial hierarchy."

for the reason that the evidence and admitted facts do not support this conclusion as a matter

of law, or at least it is clearly erroneous within the meaning of FRCP Rule 52(a).

8. The District Court erred in entering judgment limiting appellee's liability and in failing to enter judgment denying limitation of liability.

SUMMARY OF ARGUMENT

All specifications of error pertain to our single contention on this appeal, that the evidence and admitted facts do not support the judgment of the District Court limiting liability. Therefore, all specifications will be discussed together.

a. The District Court Ruling Limiting Liability was Erroneous as a Matter of Law.

1. By agreed order, the District Court directed that the issue of liability was to be determined by the State Court and therefore, after the State Court's determination of this issue, appellee's responsibility for the explosion was permanently fixed.

2. The foreseeability of the explosion and its negligent causation by someone in appellee's organization were necessary ingredients of the liability found by the State Court.

3. The State Court, in findings which were conceded by appellee to be binding in these limitation proceedings, exonerated appellee's tankermen from negligence. Since appellee's

liability was not on a vicarious basis through the acts of its tankermen, but appellee was in any event liable for the explosion, as admittedly it was, its negligence necessarily resided at the management level of the corporation.

States Steamship Co. v. U. S., (9th C.A.) 259 Fed. (2d) 458.

4. If, as is the admitted fact, appellee's tankermen, Oldfield and Bunce, "did not possess sufficient skill or understanding of things electrical," appellee's management had a clear legal duty to fill this void through education, instruction or regulation of these subordinate employees.

Restatement of Agency, 2nd Ed., §213; 57 C.J.S. 272, Master and Servant, §560.

5. It was the undisputed evidence in the District Court that appellee's management had not educated or issued any instructions to its tankermen as to safe practices to pursue in the event of any malfunction of the electrical systems on these barges, particularly when loading or unloading was underway or about to proceed.

6. The foregoing undisputed evidence of a failure to adequately instruct the subordinate employees, when coupled with the judgment of the State Court holding appellee liable but exonerating its subordinate employees from blame, establish the privity and knowledge of appellee corporation as a matter of law.

b. The District Court Ruling, if not Erroneous as a Matter of Law, was Clearly Erroneous as a Matter of Fact.

ARGUMENT

a. The Admitted Facts in the Pre-Trial Order, Coupled With the Clear Showing of a Total Failure to Adequately Instruct the Subordinate Employees, Establish Privity and Knowledge as a Matter of Law.

By the terms of the agreed order entered in this cause pursuant to which the action in the Washington State Court proceeded to trial, the issue of liability of Pacific Inland Navigation Company was to be determined by the State Court, and the U. S. District Court was, thereafter, to determine only the question of whether any such liability should be limited pursuant to 46 U.S.C. §183(a) (Tr. 37-39). The State Court, on the basis of evidence there presented, found common law liability (Tr. 49-53). By the findings of the State Court, this common law liability was based on negligence, and necessarily so, since this is not a situation where strict liability could be imposed (Tr. 51-52).

The issue of liability having been remanded to the State Court for determination, its finding thereon is binding in the present proceedings, and the District Judge recognized this when he said in his comments at the conclusion of the trial: "I am not passing on negligence" (Tr. 38, 344). He also recognized it by his subsequent action in entering judgment denying appellee's petition for exoneration from liability (Tr. 133). The single issue, then, before the District Court was as to whether or not appellee had sustained the

burden of proving its right to *limitation* of liability pursuant to 46 U.S.C. §183(a), which provides as follows:

> "The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, *without the privity or knowledge of such owner or owners,* shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." (Emphasis supplied.)

This Court has had many occasions to consider the meaning of the foregoing statute. Your recent decision in *States Steamship Co. v. U. S.,* 259 Fed. (2d) 458, is, we feel, most instructive and closely parallels the legal situation in the present case, although the facts are quite different. Here the State Court found that this casualty was the result of negligence for which appellee was liable. Similarly, in *States Steamship Co.,* the District Judge found that there was negligence justifying and requiring the denial of the company's petition for exoneration, but the District Judge granted the plea for limitation of liability. This Court, in reversing the latter action of the District Judge, said at page 473:

> "It is thus apparent that the District Court found there was negligence. After noting that that finding was abundantly supported by evidence, we have by our decision pointed out that upon this record such negligence was necessarily

the negligence of Vallet. Accordingly, we hold limitation of liability must be denied."

Elsewhere in the course of the opinion, this Court said at page 464 and 465:

"Finding VII (of the District Court) is as follows:

'That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner.'

"Before there could be a finding or conclusion such as Finding VII there would have to be a finding based on evidence that the negligence which the court found existed was that of a non-supervisory agent such as a master or an operating engineer. * * *

"The reason there is no basis for the limitation here is that the only persons whose negligence could have operated to bring about the unseaworthy condition, the only persons to whom the lack of due diligence could possibly be charged, were persons who were managing officers of the corporation. The court not only did not find that the failure to exercise due diligence was that of minor or subordinate employees, but the court could not have made such a finding." (Parenthesis and emphasis supplied.)

Similarly, in the case at bar there is a binding determination of liability based on negligence, and the only question in this proceeding is: *Whose negligence,* managerial employees or subordinate employees?

It is self-evident that, *as between master and servant,* a servant cannot be charged with responsibility,

or at least all responsibility, for injury or damage to the person or property of third persons where he acts or omits to act in ignorance of the hazards and consequences attendant upon his conduct. Knowledge that one's conduct involves an unreasonable and foreseeable risk of harm is an essential element to the imposition of liability based upon negligence.

A general statement of the basic principle involved is set forth in 38 Am. Jur. 665, Negligence §23, in the following terms:

> "The foundation of liability for negligence is knowledge * * * Concisely stated, negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its equivalent."

The same principle was recognized and applied by this Court in the case of *United States v. Marshall,* 230 Fed. (2d) 183, 189, wherein it was stated:

> "A defendant cannot be held responsible on the theory of negligence for an injury resulting from an act or omission on his part unless it can be shown that the defendant had knowledge or its equivalent—opportunity by the exercise of reasonable diligence to acquire knowledge—of the hazard to which plaintiff has been subjected."

Here it is conceded that Oldfield and Bunce did not have knowledge of the danger which inhered in their acts. The State Court found:

> ". . . The aforesaid employees of defendant (appellee), Oldfield and Bunce, did not possess sufficient skill or understanding of things electrical so as to realize that the circuit breaker switch by so tripping, was giving notice or warning of a defective or shorted condition in the said starboard deck light circuit, and the said

> employees proceeded to replace the breaker switch with a new one, which was followed by the apparently normal operation of the starboard deck lights."

In the pre-trial order, this finding was among those of the State Court which were conceded by appellee to be binding in these limitation proceedings (Tr. 67-68). On the basis of this finding, knowledge of the risk involved in replacing the tripped circuit breaker and re-energizing the circuit on appellee's barge—an essential element in establishing negligence on the part of Oldfield and Bunce for the ensuing explosion—was *conclusively* and *admittedly* found to be lacking. Absent this element of knowledge, Oldfield and Bunce were not and could not be negligent and, as in the *States Steamship Company* case, the negligence that proximately caused the explosion was necessarily that of appellee's managerial employees, in this instance, in totally failing to instruct or otherwise educate its rank and file employees as to safe procedures to be followed in dealing with electrical malfunctions during the unloading procedure.

An employer is at liberty to hire employees of any level of intelligence or training that he desires. However if, as in the present case, the employer chooses to hire persons with insufficient training or skill for the job at hand or some aspect thereof, a positive duty then devolves upon the employer to fill this void by such rules, regulations, instructions, education or supervision as the circumstances may require. That such a duty exists, and that it exists for

the benefit of third persons is, under the authorities, clear, and is more fully discussed hereafter at pages 30-34.

This action, from its inception, and in both the State and District Courts, was for damages that resulted from appellee's negligent failure to perform this duty. Respectfully directing this Court's attention to the evidence on this issue, it is undisputed that appellee's managerial personnel gave no attention whatsoever to the matter of precautions to be taken by its subordinate employees in the wake of electrical malfunctions while defueling its gasoline tankers of their highly explosive and dangerous cargoes. (Tr. 185, 186, 210-12, 245). Appellee's indifference to this critical phase of its operations was necessarily neglect on the part of its managerial employees, since it is obvious that rule-making and employee education are functions peculiar to and dischargeable only by management, for a breach of which management alone is responsible.

Appellee offered testimony of a claimed custom among barge operators to rely on their tankermen to deal instinctively with electrical malfunctions. This testimony, which was squarely met and flatly contradicted by appellant, was apparently offered for the purpose of excusing and justifying appellee's failure to perform this educational duty. We suggest to the Court that there was nothing magic about this evidence of a claimed custom, and it could not and did not change the substandard and negligent character of appellee's conduct in haphazardly dealing with so ex-

plosive and hazardous a mixture as gasoline vapor and air. Courts have universally condemned such attempts by an industry to thus justify its self-imposed standards, a point that will also be more fully discussed at pages 28-29. Be that as it may, however, we submit that such evidence of custom was entitled to no consideration, as it could only represent an attempt by appellee to contradict the admitted and established fact of liability, as conclusively found by the State Court.

Appellee also offered testimony in the District Court tending to show that the explosion was not foreseeable, and that there was no reason for management to anticipate and guard against its employees re-energizing an electric circuit after the current therein had been interrupted by the tripping of a circuit breaker. The manner in which the explosion of appellee's barge was triggered, as found by the State Court, was not unique. The reports contain a number of cases in which courts have been called upon to consider the question of liability for disasters caused by employees re-energizing an electric circuit after the current therein had been interrupted automatically through the operation of a safety device, such as a circuit breaker.

Craft v. Pocahontas Corp., (W. Va.) 190 S.E. 687;

Martin v. Northern States Power Co., (Minn.) 72 N.W. (2d) 867;

Edgarton v. H. P. Welch Co., (Mass.) 74 N. E. (2d) 674, 679;

Short v. Central La. Electric Co., (La.) 36 So. (2d) 658;

Hughes v. La. Light & Power Co., (La.) 94 So. (2d) 532.

However, aside from considerations of the frequency with which mishaps have been similarly caused, a circumstance which bears directly on the issue of foreseeability, that issue was necessarily determined by the State Court when it resolved the issue of liability against appellee and found that the explosion was negligently caused.

It is fundamental that foreseeability by someone in appellee's organization of the chain of events that caused the explosion of its barge was essential before liability for negligence could be imposed upon it. Liability presupposes the existence of negligence and proximate cause, and these elements of liability in turn presuppose the existence of foreseeability. The rule in this respect was recognized by this court in the case of *Alaska Freight Lines v. Harry,* 220 Fed. (2d) 272, 275, wherein you quoted with approval from 155 ALR 157 as follows:

> "Generally an act or omission does not constitute actionable negligence unless a reasonably prudent person placed in the position of the actor would have foreseen the probability of harm resulting from his acts or omissions."

In other words, the whole includes the sum of its parts, and the binding determination by the State Court that appellee was negligent, necessarily included within it the equally binding determination

against appellee of all the elements of actionable negligence, including foreseeability.

Thus, it is appellant's initial position in this Court that the State Court determination of the issue of liability against appellee, coupled with the admitted facts by which appellee is bound and the clear showing on the trial below that no instructions of any kind were given to the subordinate employees as to safe methods of dealing with electrical malfunctioning, conclusively established a failure of appellee to discharge an affirmative duty peculiar to its managerial personnel, the foreseeable result of which was the explosion, and, therefore, appellee is not, as a matter of law, entitled to limit its liability.

b. The District Court Finding that Liability Should be Limited is Clearly Erroneous as a Matter of Fact.

We again refer to the decision of this Court in *States Steamship Co. v. U. S.*, 259 Fed. (2d) 458. At page 474, this Court discussed and recognized "the vast difference" between dockside casualties and disasters on the high seas, and quoted as follows from Gilmore and Black, The Law of Admiralty:

> " 'The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his 'servants' once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his

> effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance'"* (Emphasis by this Court.)

Earlier, at page 466, in the *States Steamship Co.* case, this Court also said:

> "Within the meaning of the section of the statute limiting liability, 'knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it.' The Cleveco, 6 Cir., 154 F. 2d 605, 613. The burden is upon the owner seeking limitation of liability 'to prove lack of knowledge or of the means of knowledge on his part or that of his marine superintendent that his vessel was unseaworthy.' Id. 'The measure in such cases is not what the owner knows, but what he is charged with finding out.' Great Atlantic and Pacific Tea Co. v. Brasileiro, 2 Cir., 159 F. 2d 661, 665."

Here, appellee's supervisor of terminals, E. R. Boyles, testified that he had no knowledge of the hazard of re-energizing an electrical circuit after the tripping of a breaker. The District Judge, seemingly on the basis of this, announced his finding that this occurrence was "without the privity or knowledge" of appellee. Thereafter, the District Judge made a formal finding of fact that appellee "had no knowledge of any unusual hazards" involved in re-energizing of the circuit (Tr. 105). However, no finding of fact was made as to an absence of circumstances which would charge appellee with such knowledge.

We assert that the danger of re-energizing an electrical circuit on a gasoline barge which is being or is about to be unloaded, where a fuse has blown or a circuit breaker has tripped, should be self-evident to persons at the management level of such a company. This is not a residential circuit where fuses blow because of the addition of too many appliances to the circuit. This is a circuit with a constant load of five lights, as shown by Exhibit 6, and when a circuit breaker trips on such a circuit, it is a clear warning that there may be a short somewhere in the line (Tr. 177).

Despite the denial of actual knowledge of this hazard, appellee's management personnel certainly had the means of knowledge. In conducting such a highly hazardous activity, they certainly were obliged to give some consideration to the perils incident to malfunctioning of the electrical systems on these barges, and similarly, they should have considered whether or not their employees knew how to safely cope with malfunctions, and to instruct or educate those who did not have such knowledge.

Here the involved employees, Oldfield and Bunce, did not have such knowledge. They did not have "sufficient skill or understanding of things electrical." To this finding the District Court was bound. Moreover, it is self-evident that appellee's employees were oblivious to the hazards involved in re-energizing the starboard deck lights on the barge during the unloading procedure, since their conduct in so doing

involved a grave risk of harm to their personal safety and well-being.

By cross-examination of appellee's witnesses, E. R. Boyles and R. E. Williamson, appellant established beyond question that appellee's management had never issued any instructions to its tankermen and other subordinate personnel as to safe methods to employ in dealing with electrical malfunctions, and simply left it up to Mr. Oldfield, as the maintenance man, to "fix what he could" (Tr. 185-186, 210-212, 245).

We cannot stress too strongly the undisputed fact, as conceded by appellee's supervisor, Mr. Boyles, that these deck lights were no more than a convenience, and not at all necessary for the unloading of the barge (Tr. 247). Mr. Holt, the electrician who testified as an expert witness for appellee, agreed that under such circumstances the safe thing to do was to leave the lights off, even though the trouble appeared to be in the circuit breaker itself (Tr. 285).

During Mr. Holt's direct examination, we find a curious bit of testimony along the same lines. He had testified that he would be "fairly positive" that the trouble was in the circuit breaker and not the line if, after the circuit breaker tripped, its replacement resulted in lights (Tr. 271). He was then asked, "Suppose that the lights did not go on or that it kicked off again after you had replaced the circuit breaker unit, what would you consider in your experience in this marine work should be done then?"

To this Holt replied, "I would leave it alone *until the unloading process was complete*" (Tr. 271). Elsewhere, Mr. Holt freely conceded his knowledge that a short circuit can be of an intermittent nature, as the State Court found this one to be (Tr. 280, 69). Thus Mr. Holt clearly recognized that, if a replacement circuit breaker again tripped when the line was re-energized, a short in the line was indicated and that it presented a danger during unloading. But, additionally, he recognized that shorts can be of an intermittent nature, so that whether or not the tripping continues after the replacement of the circuit breaker becomes of little significance in terms of danger.

In general, Mr. Holt and appellee's other witnesses testified that what Oldfield and Bunce did in this particular instance conformed to the standards and practices of the industry, and the holding of the District Judge limiting liability seemed to be on the basis of such testimony. We earnestly submit, however, that the foregoing testimony of appellee's own expert, clearly demonstrates how haphazard and lacking in attention to safety is any such practice in an industry concerned with the transportation of such a dangerous commodity.

The custom or practices of an industry are never controlling on the question of negligence. In *Texas & P. R. Co. v. Behmeyer,* 189 U. S. 468, 47 L. ed. 905, Justice Holmes said:

> "What usually is done may be evidence of what ought to be done, but what ought to be done

is fixed by a standard of reasonable prudence, whether it is usually complied with or not."

In *The T. J. Hooper,* (2nd C.A.) 60 Fed. (2d) 737. we find Judge Learned Hand saying:

> "There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves (citing cases). Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."

The tanker industry of which appellee is a member is no exception to the general rule. In *Petition of Oskar Tiedemann & Co.,* (D.C. Del.) 179 Fed. Supp. 227, (affirmed in 289 Fed. (2d) 237) a gasoline tanker owned by the government was permitted, in accordance with a custom in the tanker industry, to sail with gasoline vapor in her tanks, the presence of which caused a violent explosion when it collided with another vessel. In denying the government's petition for exoneration from or limitation of liability for the explosion, the Court at page 238 observed the following with reference to the custom relied upon;

> "The tanker industry cannot hoist itself by its own bootstraps through the device of setting up standards of conduct amounting to something less than reasonable care under all the circumstances and then predicate a defense on such substandards. The Federal and State Courts

have long since laid to rest the ghost of this argument."

The Coast Guard regulations (46 C.F.R. 111.55.25) wisely require circuit breakers or fuses as overcurrent protection on vessels to "minimize the hazard of fire". However, such devices are of little value if their functions and purposes are not understood. Appellee's management certainly knew, and at least were charged with knowledge, that the handling, loading and unloading of gasoline and any malfunctioning of electrical systems and circuits do not mix. Certainly they had some duty to inquire into the hazards and the capabilities of the subordinate employees to safely cope with such hazards. And surely appellee's management had the duty of instructing or educating employees who did not understand these things, as Oldfield and Bunce concededly did not.

The master's duty in this respect is set out in Restatement of Agency, 2nd Ed., Sec. 213:

> "A person conducting an activity through servants or other agents is subject to liability from harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or
>
> (c) in the supervision of the activity; * * *
>
> *"Comment g. Inadequate regulations.* A master is negligent if he fails to use care to provide such regulations as are reasonably necessary to pre-

> vent undue risk of harm to third persons or to other servants from the conduct of those working under him. See § 508 and the Restatement of Torts, § 317. One who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others. He is likewise required to make such reasonable regulations as the size or complexity of his business may require."

To this same effect, in 57 C.J.S. 272, Master and Servant §560, the rule is expressed in the following terms:

> "Negligence of the master in failing properly to instruct his servants as to the method of performance of the work which they are employed to do renders him liable for injuries as to third persons resulting therefrom, as does his failure to see that his instructions are obeyed."

The master's duty to third persons in this particular was recognized in the early case of *Mitchell v. Boston & M. R.R.,* (N.H.) 34 Atl. 674. The facts, similar in principle to those before the Court in this case, showed that plaintiff was struck and injured by one of the defendant's trains while crossing a frequently used pathway in the defendant's yard. The defendant's engineer denied any personal knowledge of the pathway or the frequency of its use. The Court held that, assuming the engineer was free from fault with respect to the plaintiff's injuries because of his personal ignorance, his employer was in any event liable and stated:

> "If he (the engineer) neither knew, nor reasonably could have known, the situation, and was

> therefore personally without fault, the negligence was more immediately and directly that of the defendants, in not informing him of the pathway and of its use. *A master is as responsible for injuries caused by his negligence in not informing his servant of danger known to him, and not known by the servant, as he is for injuries caused by the personal negligence of the servant. He is not less responsible for his own negligence than he is for that of his servants.*" (Parenthesis and emphasis supplied.)

In *Dimmey v. West Virginia Traction & Electric Co.,* (W. Va.) 99 S.E. 93, a damage action for personal injuries sustained by the plaintiff when she was struck by one of the defendant's trolley cars, the Court recognized the rule that:

> "The law imposes upon pedestrians and others using public highways in which railways are operated the duty of constant and vigilant care and prudence for their own safety. *At the same time, it imposes upon the railway company a duty, * * * to adopt such rules, regulations, and methods of operation, as are reasonably necessary to prevent injury to them.*" (Emphasis supplied.)

Other cases either recognizing or applying the rule of liability for injury or damage to third persons resulting from a master's neglect to instruct or educate his employees as to the duties involved in their positions are:

> *Sloss-Sheffield Steel & Iron Co. v. Bibb,* (Ala.) 51 So. 345;
>
> *Penas v. Chicago, M. & St. Paul Ry. Co.,* (Minn.) 127 N. W. 926;
>
> *Smith v. Boston & M. R. R. Co.,* (N.H.) 177 Atl. 729.

This court, sitting in judgment of appeals in admiralty, has recognized a vessel owner's obligation to educate his employees concerning duties incident to their employment or hazards likely to be encountered in the performance of their duties, and on at least two occasions has denied limitation of liability for losses resulting from a negligent failure to perform this duty.

In *The Silver Palm,* (9th C.A.) 94 Fed. (2d) 776, a vessel owner's petition for limitation of liability for losses resulting from a collision was denied. It appeared that the collision was caused in part by excessive speed on the part of the captain of the vessel to which this Court held the owner had no knowledge and was not privy. However, it further appeared that the involved vessel had a peculiarity about its engine which made it unusually difficult and slow to execute a reversing maneuver and that this condition was a contributing cause to the collision. The owner of the vessel had knowledge of this peculiarity but had failed to bring it to the attention of the ship captain, and limitation of liability was denied because of the owner's—

> "* * * failure to communicate to the captain the peculiarity of the ship's extraordinary long stopping period from the usual speed at sea under emergency conditions requiring the reversal * * *"

Similar in principle to the decision of *The Silver Palm* is the case of *In Re Pacific Mails S. S. Co.,* (9th C.A.) 130 Fed. 76, in which this Court denied a vessel owner's petition for limitation of liability

where it appeared that the loss of lives and property for which recovery was sought resulted from an inability on the part of the ship's officers to communicate orders for the lowering of lifeboats to its non-English speaking Chinese crew because of the language barrier. It was held that the owner of the vessel was negligent in failing to see to the education of the Chinese crew in emergency procedures.

There is nothing disclosed by this record which afforded any basis for appellee's management to assume that its subordinate employees in general or Oldfield and Bunce in particular had the know-how to safely handle electrical malfunctions on these gasoline barges. Notwithstanding this, appellee did so assume and gave no heed to their education or regulation, and in this, we say, appellee was personally negligent. Such negligence was a proximate cause of the explosion in view of the binding finding of the State Court that Oldfield and Bunce "did not possess sufficient skill or understanding of things electrical, etc." and the clear evidence that these men would have followed any instructions given them (Tr. 188-189). Had appellee's supervisory personnel but told the subordinate employees to proceed without lights under such circumstances, this disaster would have been avoided. The record clearly discloses this (Tr. 188-189).

We earnestly submit that the explosion was caused, at least in some part, by negligence personal to appellee and within its privity and knowledge and that

the finding of the District Judge to the contrary is untenable and clearly erroneous.

This is not a case in which it was necessary for the District Court to weigh the relative merits of conflicting evidence nor would it be necessary for this court to do so in order to reverse the judgment below. Rather, the decision of the District Judge was, in our humble opinion, the result of a clearly erroneous factual conclusion from the admitted and undisputed facts. In other words, the District Judge, from a set of facts as to which there was not and could not be any dispute, held that the management personnel of appellee corporation was not negligent. We think this factual conclusion is untenable and that this Court should conclude, from these same undisputed and undisputable facts, that the involved casualty was, in fact, caused by negligence of appellee's management personnel or, in the words of the statute, that the casualty occurred with "the privity or knowledge" of the owners of the vessel.

Contrary to what occurred in the State Court trial, appellant, in the District Court trial of the limitation of liability proceedings, offered the testimony of only one witness, a Mr. John M. Knisley, a certified marine chemist from Seattle. His testimony was basically limited to the custom among ship owners with regard to instructing their employees as to safe practices in the face of malfunctions of the electrical system of gasoline barges, Mr. Knisley's version being that prudent barge owners instructed their employees

to totally refrain from re-energizing an electrical circuit which had given evidence of trouble where loading or unloading of gasoline was either in progress or about to begin (Tr. 330-332).

Appellant offered this testimony simply because appellee had previously offered the testimony of Walter T. House, a tug boat captain from Seattle, to the effect that operators of gasoline barges do not issue any specific instructions in such matters, rather relying upon their subordinate employees or tankermen to deal instinctively with any such electrical trouble (Tr. 303).

We suggest to this Court that the testimony of appellant's only witness, Mr. Knisley, be totally disregarded in the court's consideration of this appeal. It is our position that the established and admitted facts compel the factual conclusion that the owners of this barge were negligent in failing to issue any instructions to the subordinate employees or tankermen as to safe practices to employ in the face of electrical troubles, irrespective of what the custom may have been in the shipping or barging industry.

Had there been no evidence whatsoever of the manner in which the explosion of appellee's barge occurred, this casualty would have presented a classic "*res ipsa loquitur*" situation, as the decisions of this Court make clear.

Union Pac. R. Co. v. DeVaney, (9th C.A.) 162 Fed. (2d) 24;

The Rocona v. G. F. Atkinson Co., (9th C.A.) 173 Fed. (2d) 661;

Furness, Withy & Co. v. Carter, (9th C.A.) 281 Fed. (2d) 264.

The doctrine of *res ipsa loquitur* is fully applicable to suits in admiralty.

Austerberry v. U. S., (6th C.A.) 169 Fed. (2d) 583;

Johnson v. U. S., 333 U. S. 46, 92 L. ed. 468.

In the nature of things, barges such as this do not explode in the absence of negligence of the operator, and the following are but a few of the many cases holding that a presumption or inference of negligence can be indulged under similar circumstances.

Leathem, Smith-Putman Nav. Co. v. Osby, (7th C.A.) 79 Fed. (2d) 280;

Austerberry v. U. S., (6th C.A.) 169 Fed. (2d) 583;

Gilroy v. Standard Oil Co., (N. J.) 151 Atl. 598;

Guilford v. Foster & Davis, (Okla.) 268 Pac. 299;

Pope v. Edward M. Rude Carrier Corp., (W. Va.) 75 S. E. (2d) 584;

Siniarski v. Hudson, (Ill.) 87 N. E. (2d) 137.

Thus, without any facts beyond the mere explosion, there is a reasonable inference that someone connected with appellee, as the operating company, was guilty of negligence, either management or the employees immediately handling the barge.

Here, however, by way of the conceded or undis-

puted facts, we know considerably more about this explosion, all pointing inexorably to negligent causation by some person or persons in appellee's organization. We know as an absolute fact that it was caused by a short in the starboard deck light circuit which produced an electric arc igniting the gasoline vapors incident to the unloading operation which was in progress (Tr. 67-68). We know that this same short was a defective condition in the starboard deck light circuit which had manifested itself approximately four hours earlier to Messrs. Oldfield and Bunce, the two employees of appellee who were readying the barge for unloading (Tr. 68). At that time we know that the circuit breaker switch on the vessel which served the starboard lights had kicked off or tripped, as this device was designed to do in the event of a malfunction of the circuit—a clear advance warning (Tr. 68). We know that this short was of an intermittent nature and that such an intermittent short circuit can be anticipated (Tr. 69, 280).

Finally, as determinative of the vital question of where in appellee's organization resided the fault or responsibility for this disaster, we know that Messrs. Oldfield and Bunce "did not possess sufficient skill or understanding of things electrical" so as to realize that the tripping of the circuit breaker was giving notice of a short in the circuit, and proceeded to re-energize the circuit after replacing the circuit breaker switch, thereby, unbeknownst to them, and without negligence of their part, setting the stage for the explosion to follow (Tr. 68).

If our understanding of pre-trial procedures is correct, the foregoing facts found by the State Court and conceded to be binding in the pre-trial order, are not subject to being nibbled at or their potency lessened in any way by any testimony which may, thereafter, have crept into the record. Appellant, as we understand it, was entitled to rest its case on these facts with full confidence in their integrity. But, despite our efforts on the trial below to confine matters to the boundaries established by the pre-trial order, much testimony slipped in through appellee's witnesses as to such pre-determined matters. Because of this, we earnestly feel that the decision of the District Judge was subconsciously influenced by what amounted to a one-sided presentation of the issues already determined in the State Court, and that appellant was unwittingly placed at a fatal disadvantage by its total reliance on the pre-trial order.

Be that as it may, however, we feel that this Court, on taking this case by its four corners, should be left with a firm conviction that appellee is not entitled to limitation of liability.

CONCLUSION

We earnestly contend that the judgment of the District Court should be reversed with directions to enter judgment denying appellee's "Petition for Exoneration from or Limitation of Liability" in its entirety. And we again direct the Court's attention to its final rehearing decision in *States Steamship*

Co. vs. U. S., 259 Fed. (2d) 458, which, we feel, cannot be distinguished in principle.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME WILLIAMS
Proctor

APPENDIX

Table of Exhibits

Exhibit No.	Description	Identified	Offered and Received
1	Copy Amended Complaint	85	152-3
2	Copy of Answer	85	152-3
3-A	Copy Findings of Fact	85	152-3
3-B	Copy of Judgment	85	152-3
4	USCG Inspection Cert.	85	152-3
5	Condulet & Circ. Break.	85	152-3
6	Electric. Install. plan.	85	152-3
7	Piping and Venting plan	85	152-3
8	USCG Findings of Fact	85	152-3
9	Port of Pasco dock plan	85	152-3
10	Port of Pasco dock sketch	85	152-3
11-A	Photo Port of Pasco dock	85	152-3
11-B	Photo Port of Pasco dock	85	152-3
11-C	Photo Port of Pasco dock	86	152-3
11-D	Photo Port of Pasco dock	86	152-3
11-E	Photo Barge 535	86	152-3
12	Rules and Regulations	86	152-3
13	Barge Inspection Reports	86	152-3
14	Letter Memo 7/2/58	86	152-3
15	Barge Pumping Instructions	86	152-3